IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

JAMES F. MOORE,
Defendant in Error.

No. 1518.

ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, EASTERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

A. G. AVERY,
United States Attorney.

J. B. LINDSLEY,
Assistant United States Attorney.

J. R. Lambly, the Law Printer, Spokane

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Statement of the Case.

This is an action in ejectment brought by the plaintiff in error, the United States of America, against the defendant in error, James F. Moore, to recover from him certain land in Okanogan County, Washington, and described and referred to in the complaint.

The complaint (Record, p. 2.) states that acting in accordance with an Act of Congress, passed July 4, 1884 (23 Statutes, 79-80), and entitled "An Act making appro-

riations for the current and contingent expenses of the ndian Department, and for fulfilling treaty stipula- ons with various Indian Tribes for the year ending une 30th, 1889, and for other purposes," the President the United States did, on May 1, 1886, by Executive der, set aside as an individual reservation of and for e Quo-lock-ons, an Indian and ward of the Govern- nt, the land above referred to, and that said land has retofore been duly selected in accordance with the ms of said Act under the direction of the Secretary of Interior and is known as Allotment No. 7. The com- int further states that said Indian was, at the time d individual reservation was set aside for him as afore- d, a member of the Columbia tribe of Indians and sided on the Columbia Indian reservation in the State Washington, and that said lands were, at the time of d allotment, within the limits of said reservation.

It is further alleged in the complaint that Quo-lock- s, in 1890, died intestate, leaving as his only heirs two ns named respectively, Frank, alias Dominique Te- m-tarl-ken, and Sam Pierre; that Sam Pierre there- er died intestate, without issue, leaving a widow, Jen- e, who is an Indian and a member of said Columbia tribe Indians, and then and now a resident of said Columbia dian reservation. It is also alleged in the complaint at the plaintiff in error is the owner of said land and has e title thereto, subject only to the rights of said Frank, as Dominique Te-kom-tarl-ken and said Jennie, to use d occupy the same as an individual Indian reserva- on and as wards of the plaintiff. The complaint fur- er alleges that on or about August, 1904, the defend-

ant, without right or authority, entered upon and took possession of the lands above referred to and ousted said Indians Frank and Jennie and the plaintiff therefrom and has ever since unlawfully withheld the possession thereof from said Indians and the plaintiff to their damage. The judgment prayed for is for the recovery of the possession of the premises and for damages for withholding the same.

The agreement referred to in the Act of Congress and described in the complaint, was judicially noticed by the lower court (being the so-called Moses agreement) and is in the words following:

"In the conference with chief Moses and Sar-sarp-kin, "of the Columbia reservation, and Tonaskat and Lot, "of the Colville reservation, had this day, the following "was substantially what was asked for by the Indians:

"Tonasket asked for a saw and grist mill, a boarding "school to be established at Bonaparte creek to accom- "modate one hundred pupils (100), and a physician to "reside with them, and $100. (one hundred) to himself "each year.

"Sar-sarp-kin asked to be allowed to remain on the "Columbia reservation with his people, where they now "live, and to be protected in their rights as settlers, "and in addition to the ground they now have under "cultivation within the limit of the fifteen mile strip cut "off from the northern portion of the Columbia reserva- "tion, to be allowed to select enough more unoccupied "land in severalty to make a total to Sar-sarp-kin of "four square miles, being 2,560 acres of land, and each "head of a family or male adult one square mile; or

o move on to the Colville reservation, if they so desire, nd in case they so remove, and relinquish all their laims to the Columbia Reservation, he is to receive ne hundred (100) head of cows for himself and people, nd such farming implements as may be necessary.

' All of which the Secretary agrees they should have, nd that he will ask Congress to make an appropri- tion to enable him to perform.

' The Secretary also agrees to ask Congress to make n appropriation to enable him to purchase for Chief Moses a sufficient number of cows to furnish each one f his band with two cows; also to give Moses one thou- and dollars ($1,000) for the purpose of erecting a welling house for himself; also to construct a saw mill nd grist mill as soon as the same shall be required or use; also that each head of a family or each male dult person shall be furnished with one wagon, one louble set of harness, one grain cradle, one plow, one harrow, one scythe, one hoe, and such other agricul- ural implements as may be necessary.

" And on condition that Chief Moses and his people keep this agreement faithfully, he is to be paid in cash, n addition to all of the above, one thousand dollars $1,000) per annum during his life.

" All this on condition that Chief Moses shall remove o the Colville reservation and relinquish all claim pon the government for any land situate elsewhere.

" Further, that the Government will secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville reservation, and en- gage in farming, equal rights and protection alike with all other Indians now on the Colville reservation, and

" will afford him any assistance necessary to enable him " to carry out the terms of this agreement on the part " of himself and his people. That until he and his " people are located permanently on the Colville reser- " vation, his status shall remain as now, and the police " over his people shall be vested in the military, and " all money or articles to be furnished him and his peo- " ple shall be sent to some point in the locality of his " people, there to be distributed as provided. All other " Indians now living on the Columbia reservation shall " be entitled to 640 acres, or one square mile of land, to " each head of family or male adult, in the possession " and ownership of which they shall be guaranteed and " protected. Or should they move on to the Colville " reservation within two years, they will be provided " with such farming implements as may be required, " provided they surrender all rights to the Columbia " reservation.

"All of the foregoing is upon the condition that Con- " gress will make an appropriation of funds necessary to " accomplish the foregoing, and confirm this agreement; " and also, with the understanding that Chief Moses or " any of the Indians heretofore mentioned shall not be " required to remove to the Colville reservation until " Congress does make such appropriation," etc.

2 *Indian Laws and Treaties* (Keppler), p. 1073, (2d ed.)

That part of said Act of Congress which relates to the subject under discussion is in the following language:

For the purpose of carrying into effect the agreeent entered into at the city of Washington on the venth day of July, eighteen hundred and eighty-ree, between the Secretary of the Interior and the ommissioner of Indian Affairs and Chief Moses d other Indians of the Columbia and Colville resvations, in Washington Territory, which agreeent is hereby accepted, ratified and confirmed, inuding all expenses incident thereto, eighty-five thound dollars, or so much thereof as may be required erefor, to be immediately available; provided, that arsopkin and the Indians now residing on said Colubia reservation shall elect within one year from e passage of this Act whether they will remain upon id reservation on the terms therein stipulated or reove to the Colville reservation: And provided, furer, that in case said Indians so elect to remain on id Columbia reservation the Secretary of the Inteor shall cause the quantity of land therein stipulated be allowed them to be selected in as compact form possible, the same when so selected to be held for e exclusive use and occupation of said Indians, and e remainder of said reservation to be thereupon reored to the public domain, and shall be disposed of actual settlers under the homestead laws only, expt such portion thereof as may properly be subject sale under the laws relating to the entry of timber nds and of mineral lands, the entry of which shall governed by the laws now in force concerning the try of such lands."

The Executive Order referred to in the complaint, of which the lower court took judicial notice, is

found on page 75 of Executive Orders relating to Indian Reserves, issued prior to April 1, 1890 (also in Executive Orders relating to Indian Reserves from May 14, 1855, to July 1, 1902, page 113), and is as follows:

"Executive Mansion, May 1, 1886.

* * * * * * * * *

"and it is hereby further ordered that the tracts of "land in Washington Territory surveyed for and allotted "to Sar-sarp-kin and other Indians in accordance with "the provisions of said Act of July 4, 1884, which allot- "ments were approved by Acting Secretary of the In- "terior, April 12, 1886, be, and the same are hereby, "set apart for the exclusive use and occupation of said "Indians, the field-notes of the survey of said allot- "ments being as follows:

* * * * * * * * *

(Signed) "GROVER CLEVELAND."

To the complaint the defendant demurred on the grounds, (a) That the plaintiff has no legal capacity to sue in this action; (b) that there is a defect of parties plaintiff in the action; and (c) that the complaint does not state facts sufficient to constitute a cause of action (Record, p. 6.)

The particular reasons advanced in the lower court in support of the demurrer were that the Act of Congress and Executive Order made thereunder, above quoted passed to the Indian Quo-lock-ons, a fee simple title to the lands in question, and because of that fact the Government has no further interest or right therein. The lower court decided that the United States had parted with

entire interest in the land and in accordance with
contention of the defendant in error, and that the
intiff in error, because of having no interest or right
the land had no legal grounds for prosecuting this
ion. In conformity with these views, the court sus-
ned the demurrer and entered a judgment of dis-
ssal. To this action of the court the plaintiff in error
n excepted and now prosecutes this writ of error.

Assignment of Errors.

(Record, pp. 36-39)

1. The court erred in sustaining defendant's de-
rrer to the complaint herein.

2. The court erred in entering a judgment herein
missing said action.

3. The court erred in not overruling the defendant's
murrer to the complaint herein.

4. The court erred in not entering a judgment
rein in favor of the plaintiff and against the defendant.

5. The court erred in entering a judgment herein,
the complaint, against the plaintiff and in favor of
e defendant.

6. The court erred in finding and deciding (and be-
use thereof sustaining the demurrer to the complaint
d dismissing said action) that the Act of Congress
ssed July 4, 1884 (23 Stat., 70-80), entitled "An Act
naking appropriation for current and contingent ex-
penses of the Indian Department and for fulfilling

"treaty stipulations with various Indian Tribes for the "year ending June 30th, 1885, and for other purposes," and the Executive Order of the President of the United States of May 1st, 1886, thereunder, passed a fee simple title to the lands described in the complaint from the United States to Quo-lock-ons, one of the Indians referred to in said Act of Congress and in said proclamation and named in the complaint herein, when as a matter of law, neither said Act of Congress nor said proclamation passed to said Indian the fee to said lands, but only the right to use and occupy the same under the control and supervision of the United States, said United States retaining the entire title to said lands, subject only to such use and occupation by said Indian.

7. The court erred in finding and deciding (and because thereof sustaining the demurrer to the complaint and dismissing said action) that because of said Act of Congress referred to in the next preceding assignment of error, the United States had no right or authority to institute or prosecute the above entitled action, when, as a matter of law, neither said Act of Congress nor said proclamation deprived the United States of the title to said lands, or the right to control the same and to control said Indian in his use and occupation of said lands, and when, as a matter of law, said Indian could in nowise alienate or encumber said lands without the consent and approval of the United States.

8. The court erred in finding and deciding (and because thereof sustaining the demurrer to the complaint and dismissing said action) that because of said Act of Congress referred to in assignment of error numbered 6

United States had no right, title, interest or estate in
l to the lands described in the complaint herein, or
y part thereof, when, as a matter of law, neither said
t of Congress nor said proclamation deprived the
ited States of the title to said lands, or any interest
rein other than the right of said Indian to use and
upy the same, and said Act of Congress did not as a
tter of law deprive the United States of the right
prosecute this action and eject said defendant, who,
der the pleadings herein, is not shown to be holding
occupying said lands, or any part thereof, with the
nsent or approval of the United States.

9. The court erred in sustaining the demurrer to the
nplaint and dismissing said action because of the fol-
ving reasons: (a) The complaint shows on its face
at the lands described are the property of the United
ates, the plaintiff herein, subject only to the use and
cupation under the supervision of said United States
said Indian Quo-lock-ons, or his heirs, and that the
nited States has the immediate right to the possession
said lands, subject to the Indian's rights aforesaid.
That said complaint shows on its face that the United
ates, being the owner of said lands as aforesaid, has
e right in its own name to bring said action. (c) That
e complaint does not show on its face that this defend-
t has any right, title or interest in said lands, assum-
g for the purpose of the case that the defendant has,
nce said land was allotted to said Quo-lock-ons, under
e provisions of said Act of Congress, secured from said
uo-lock-ons, or his heirs, a deed or conveyance purport-
g to convey the entire title to said land to said defend-

ant, inasmuch as neither said Quo-lock-ons or his heirs could, as a matter of law, transfer or convey said land or any interest therein without the consent of the United States, and no consent is shown to exist.

Argument.

The question presented by the record and argued before the lower court is, did the government pass to Quo-lock-ons the entire right, title, interest and estate in and to said lands by reason of the Act of Congress and the Executive Order referred to or did it grant only the right to use and occupy the land, reserving to itself the fee with the right to control the same as it controls other Indian lands as guardian of the Indians? The opinion of the lower court is reported in *United States v. Moore*, 154 Federal, 712.

Looking to the agreement alone it will be seen that the Sar-sarp-kin allotments, of which the land in question is one, are one square mile of land to each head of family or male adult "in the possession and ownership of which they shall be guaranteed and protected." Considering this language in connection with the recognized status and condition of the Indians, we can see nothing inconsistent with the government's claim that it did not intend to, and in fact did not, part with its title to the land when it entered into this agreement which was to become binding only when it received the confirmation of Congress.

"The possession and ownership" was in affect what these Indians already had as reservation Indians. What

ey desired was to live as "settlers" and have the then sting right of each to occupy all of the reservation anged so that they could occupy the land in severy; that is, each could occupy, independent of the er, a particular portion of the reservation. The use the word "severalty" meant nothing more, and its e in allotment statutes providing for the transfer of s than the entire fee, is common.

We do not deem it necessary to successfully distinish the language used in the agreement alone, and all not do so at length because the Act of Congress nditionally ratifying the agreement dispels any doubt to the intention had by the parties thereto. We omit that the agreement in every line breathes the a that the plaintiff in error had no thought of delibtely abandoning its entire claim to the individuals a band of irresponsible, incompetent and incapable dians. It certainly was not intended that Sar-sarpn should have more than he asked, and all that he deed was to be "allowed to remain on the Columbia servation with his people," or they might remove to e Colville reservation if they desired.

This so-called Moses agreement hardly rises to the gnity of a treaty, indeed, it appears to be a hearing the part of the government of some requests on the rt of the Indians. There was no ceding of territory a *primary* consideration for any acts of the Indians, is ofttimes the case, but there was an apparent dispoion on the part of the Indians to live more in accordce with the ways of the white man, and this disposin was undoubtedly encouraged on the part of the

Secretary of the Interior, who for that purpose desired to give the Indians, severally, an opportunity to cultivate and live upon portions of the lands theretofore reserved, generally, without molestation from other Indians or whites. Section 2079 of the Revised Statutes, which was in effect when this agreement was made, expressly provides that there shall be no contracts with the Indians by treaty. The sole right then on the part of the government or the Indians to enter into any obligations with each other depended upon the action of Congress. This was recognized in the so-called Moses agreement. It was made subject to congressional approval, and because of that fact we desire to call the court's attention to the Act of Congress hereinbefore quoted, which conditionally approves the agreement with the Indians and to which we must look to ascertain what passed to the Indians thereby. Congress had a right to refuse absolutely to grant to the Indians anything; it could have refused to ratify the agreement; itcould ratify it on such terms and conditions as it saw fit, and it did see fit to remove any question as to the estate it was granting to the Indians who received allotments, by expressly providing that when such Indians as elected to remain on the Columbia reservation received the respective allotments allowed them, they were "to be held for the exclusive use and occupation of said Indians." Whatever the Indians may have thought, Congress only intended to do what is stated in the Act, to wit: give to the Indians the right to *use and occupy* the lands. We can conceive of no more apt language to define the rights of the Indians in and to this land.

Again, the word "held" is pregnant with meaning in this respect. The government, through the Secretary of

Interior, was to select the respective parcels of land
when so selected it was to *hold* the same for the use
occupation of the Indians. If it was intended to say
t the lands should be held by the Indians for their
use and occupation, it would in nowise militate
inst our contention herein, but the language so
ngly indicates that it was meant that the lands would
held by the *government* for the use and occupation of
Indians that it must remove any doubt remaining.
s entirely immaterial what construction be placed on
original agreement. Neither the Secretary of the
erior nor the Commissioner of Indian Affairs could
d the government; that power existed only in Con-
ss.

For the government to *hold* this land for the exclu-
e use and benefit of the Indians was in exact accord
h its policy at the time the Act was passed, and is in
ord with its policy in dealing with the Indians to-day,
cept in so far as it has expressly provided for the In-
ns' rights to alienate. There is no question of fraud
unfairness on the part of the government, nor is there
y issue before this court as to the Indians' understand-
g of the rights granted to them by Congress, except
so far as it is apparent from the language of the Act,
erein it differs from the agreement. It cannot be said
at because the Indians did not get what they requested
at they are entitled to it. They got nothing more or
s than what Congress gave them. If it was less than
ey requested, it may well be assumed that Congress
uld give that or nothing. Congress had as valid a
ght to modify the agreement as it had to refuse its ap-
oval entirely. This last proposition will not be denied,

yet the argument in, and the decision of, the lower court suggest limitations on the right of Congress in this respect. Twenty-four years have passed and there is made the first assertion that the Indians should have received more than was given them, but it is not made by one of the beneficiaries under the Act.

The President, in making the Executive Order of May 1, 1886, above quoted, wherein this allotment is provided for, seems to have interpreted the Act of Congress referred to according to our contention, for the order says that these allotments "are hereby set apart for the exclusive use and occupation of said Indians." There is not a suggestion in the order that the Chief Executive, acting as the instrument to grant the rights that Congress had conveyed, thought that he was, by his action, giving to these Indians anything more than the right to the exclusive use and possession of these parcels of land. He was not conveying it, but was setting it apart—distinguishing it from the balance of the reservation and other like allotments.

The opinion of the learned Judge who tried the cause in the lower court, is based, we think, upon reasoning that would be more apt if this case were one in which the contract governing was between others than the government and its wards. It must be presumed that the government at all times has tried to deal fairly with the Indians, with their best interests in view, and that if it withheld from them something by them desired, it was for their good and not for the purpose of an advantage in favor of the government. There can be no other presumption than that Congress, in passing this Act, had

mind the best interests of the Indians and was seek- to protect such interests. The existence of these sumptions, which must be conceded, warrants us in sidering what Congress must have thought would be t for the Indians in enacting the statute above quoted.

The learned Judge, who decided this case in the lower rt, in his opinion, says:

"This conclusion has been reached with much reluct- nce, for no doubt it would be better for the Indians to ustain the plaintiff's contention. They are not quali- ed to cope with the white race, and the result of this ecision, should it be sustained in the higher courts, ill no doubt be prejudicial to their best interests."

May we not assume—indeed are we not bound to as- me—that the enlightened men who composed Con- ess entertained precisely the same sentiments as those pressed by the lower court? And if they did enter- n such sentiments, how can it be successfully con- ded that it was their intention, instead of aiding the dians, to do that which is confessedly to their detri- nt. Again, the Indian, in 1884, was far more de- ndent on the government, and much less able to cope th the white man than today, which suggests that ere is much more reason to believe that Congress fully preciated the disadvantage that would follow if these nds were granted outright to the Indians, and placed yond government control.

This court, in *Eells v. Ross*, 64 Federal, 417, said, 1894, and ten years after the Act of Congress above ferred to was passed:

"That the abolition of reservations and of the guard-
"ianship of the Indians is the ultimate hope of the pol-
"icy there can be no doubt; but it will not be soonest
"realized by attributing fanciful qualities to the Indians,
"or by supposing that their natures can be changed by
"legislative enactment."

Is it not probable that the gentlemen whose votes passed the law under consideration, and who had particular reasons for being well advised concerning the same, were fully aware of the dependent condition of the Indian, for they were acting at a time when his condition would more probably give rise to the sentiment above quoted than now?

In *Eells v. Ross supra*, it was held that the construction placed upon the statute by departmental officers, whose duty it is to carry out such law, should be considered in the matter of its interpretation. In addition to the interpretation placed on this law by the Chief Executive of the nation, in the Executive Order above referred to, we respectfully call the court's attention to the fact that Congress, the same body that made this law, did, on March 8, 1906, pass an Act entitled "An Act "providing for the issuance of patents for lands allotted "to Indians under the Moses agreement of July 7, 1883" (34 Stat. L., 55), covering, all the allotments made under the Moses agreement and the Act of Congress confirming it. See M^c Fadden v Mountain 8 Mo M^c Co 97 Fed 67

Is not that most excellent evidence of the interpretation placed on the former Act by the body responsible for it? The Act of 1906 referred to assumes that the

e is in the United States, and that it is held by it for
: exclusive use and occupation of the Indians, and it
provided therein that trust patents shall issue to the
pective allottees, but that they shall not alienate said
ıds within a certain period, with certain exceptions
ere stated. Congress was simply carrying out the pol-
which it pursued in 1884. It probably ascertained
ıt after twenty-three years the Indians should receive
: benefit of more definite legislation respecting their
ɔperty, and be given the right under certain condi-
ns to alienate a part thereof.

Again, Congress interpreted the Moses agreement
d the statute conditionally confirming the same in
05, by the issuing on an application therefor a patent
an Indian, Long Jim, one of the allottees under said
reement, Act of March 3, 1905 (33 Stat. L., 1064).
n it be said that Congress thought that it had granted
e fee to this land to the Indian, when such idea is ex-
essly negatived by its action in issuing a patent for
? Can there be better evidence of the interpretation
aced on this agreement, and the Act of Congress fol-
wing it, by the officers whose duty it was to carry it
t, and the law-making body which created it?

In a communication from the Commissioner of the
eneral Land Office to the Secretary of the Interior,
ted January 24, 1894, the first named officer, in dis-
ssing the status of the allotments, states that the In-
an's right and title "was that of possession, use and
cupation."

2 *Indian Laws and Treaties* (2d ed.), Keppler, p. 1049.

In *United States v. Choctaw Nation*, 179, U. S., 904, the court said, in substance, that notwithstanding the fact that Indians are unlettered and ignorant, and notwithstanding the fact that the agreement is to their disadvantage, the court has no right to disregard the meaning of an Act of Congress or a treaty where the intention is apparent; that the court is not a treaty-making power and has no right to attempt by judicial construction to change the terms of an Act of Congress even for the purpose of doing what might seem to be required by justice.

In 1886 the Supreme Court, in *United States v. Kagama*, 118 U. S., 375, made the following observation:

"These Indian tribes *are* wards of the nation. They "are communities dependent on the United States,—de- "pendent largely for their daily food, dependent for their "political rights. They owe no allegiance to the states, "and have received from them no protection. Because "of the local ill feeling, the people of the states where "they are found are often their deadliest enemies. From "their very weakness and helplessness, so largely due "to the course of dealing of the federal government with "them, and the treaties in which it has been promised, "there arises the duty of protection, and with it the power. "This has always been recognized by the executive, and "by Congress, and by this court, whenever the question "has arisen."

If the courts and Congress have, as is stated by the Supreme Court, always recognized the condition of the Indians, what reason is there for saying that Congress,

egarding all of its obligations, intended to turn over s land unqualifiedly to its weak and helpless wards, owing, as it was bound to know, that the Indians were more capable of using the land and retaining its nership against the cupidity and artfulness of the ites, than an infant, yet the defendant in error in effect s that the presumption is that Congress intended disregard all of its obligations and do this, and the rt is asked to read into the Act of Congress under cussion words of absolute conveyance instead of those ually used.

n 1902, the Supreme Court said in *United States v. kert*, 188 U. S., 432, referring to the allotments made der the general allotment act:

"These Indians are yet wards of the nation in a condition of pupilage or dependency and have not yet been ischarged from that condition. They occupy these nds with the consent and authority of the United tates; and the holding of them by the United States nder the Act of 1887 and the agreement of 1889 ratied by the Act of 1891, is part of the national policy by hich the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultinately the privileges of citizenship."

While it is true that the case referred to dealt with otments of a character different from those in this se, the Indians referred to were no more dependent—deed they were not so much so, and the statement of e court adds to the evidence showing how the Indians re considered by the courts and by Congress.

See also:

Lone Wolf v. Hitchcock, 178 U. S., 553 (23 S. C. R., 216).

Beecher v. Wetherby, 95 U. S., 525 (24 L. ed., 441).

Hollister v. United States, 145 Fed., 773.

The case relied on particularly in the lower court is *Jones v. Meehan*, 175 U. S., 1. We believe that case is easily distinguishable from the one at bar. That was a case where there was every indication that whether wise or unwise, not only the Indian, but Congress, intended to pass the fee to its grant, for after the treaty was submitted to it, it singled out, in Section 8 of the treaty, all of the proposed allotments therein granted, and provided that *they* should not pass the fee, but should only be subject to alienation by the allottee under certain conditions, and that limited patents should be issued therefor. By this provision Congress deliberately selected for the subject of its limitations all of the allotments except those for two of the chiefs, which were larger, and deliberately exempted the latter from the effect of the conditions imposed on the remainder, thereby recognizing a desire on the part of Chief Moose Dung to take the entire fee, and the Government's desire to grant it. All of those features are lacking in this case. That Chief Moose Dung expected he was getting the entire title to his allotment is also disclosed by the proceedings preceding the signing of the treaty; he said:

"I have taken the mouth of Thieving River as my "inheritance; I do not ask the chiefs where I shall go; "I make my home there"; and "I want it for a reser-

ation for myself"; and "I used to think that this was e proper place for me to settle," and "That it would an inheritance for my children"; and "Where all y children would have enough to live on in the fu- re"; and "I accept the proposition because I see I n going to be raised from want to riches — to be ised to the level of the white man."

The Commissioner answered, saying:

"Tell him I do not care anything about the mouth Thieving River. He can have it if he wants it."

The chief could have no inheritance, nor could he e any place or inheritance for his children, nor ld he be raised from want to riches unless he re- ved the fee to the land under discussion in that case. it will be seen that both parties to that transaction derstood that in giving the land to the Indian he was eiving everything consistent with the spirit of the angement which was being perfected, and Congress its formal approval on such understanding by omit- g to place upon the chief's allotment the restrictions posed on the others. It should also be remembered t this decision was unaffected by Section 2079, *Revised tutes*, subsequently enacted, hereinbefore refered to.

In the opinion of the lower court there is quoted a ision by the Secretary of the Interior, in the case of *ng Jim v. Robinson et al.*, 16 L. D., 15. The Secretary re says:

"I can see no legal reason as between them (Indians) nd the United States, for the Government withhold-

" ing from them the full benefits it agreed to bestow " upon them."

We do not understand that the Secretary's statement indicates a view contrary to that taken by the Government in this case. On the contrary, it seems entirely consistent with such view. The question under discussion by the Secretary, when that language was used, was whether or not Long Jim, who was not a party to the Moses agreement, could take advantage of it and secure an allotment thereunder. The Secretary decided, and we believe rightly, that he was one of the "other Indians now living on the Columbia reservation," referred to in the agreement, and as such, was given rights under it. From a historical standpoint the case is of some value, for it throws considerable light on the condition of the Indians at the time the agreement was entered into and prior thereto, but we do not find that the question of the *quantity* of the Indians' title was once considered. The contest was one wherein white men were attempting to locate on the Indians' land.

The government, neither at the time the conditionally ratifying Act of Congress was passed nor in this proceeding, desired or desires to deprive the Indians of their lands. On the contrary, it is its aim to preserve said lands for the Indians and "protect" them in their rights as settlers. These Indians were wards of the government when the Act of 1884 was passed, and while it transferred to the Indian the right to use and occupy the land, it retained the legal title therein and *holds* it for the Indian as any other guardian would hold property for a ward unable to himself preserve it.

Referring to that portion of the opinion of the lower
ırt quoting from a communication written by the
mmissioner of Indian Affairs on January 5, 1900,
ierein the Commissioner comments on the right of Con-
ess to amend the Moses agreement, we suggest that
requires two parties to make an agreement, and if the
reement is not to stand as it was accepted by Congress,
en it stands not at all, and the Indian in this case,
es not have even the rights the government concedes
him. In other words, the agreement stands as amended
the Act of Congress, or in law it does not exist.
ıe fact that Congress did not send the agreement back
the Indians for further consideration, does not war-
nt the contention that the agreement (if different from
e Act confirming it) stands unaltered and was ratified
Congress without condition.

The comments in the opinion of the lower court on
e statements said to have been made by Mr. Brents,
legate from Washington, and General Miles, when
e bill of 1884 was up for passage, we do not believe to
a criterion as to the intention of Congress. They only
ggest that the speakers were doubtful as to whether
ongress would ratify the agreement at all, and certainly
othing therein suggests that the question was up as to
ıether or not the grant to the Indians should be a fee
ıple title or less. So far as those statements, stand-
g alone, are concerned, they indicate that Congress did
ecisely what we contend for and the gentlemen mak-
g the statement desired. The Indians were given every-
ing in connection with the land except the naked title
ıd the right to control it in so far as it was necessary

to carry out the provisions of the agreement, the Act of Congress confirming it, and the duty of the government towards the Indians, its wards. The very rights that it is now said the government granted to the Indians and should have granted to them in justice, equity and fairness are the identical rights that the Supreme Court, this court, the lower court and the world at large admit would bring about every condition sought to be avoided. The statements attributed to these gentlemen do not warrant the construction placed thereon by the defendant in error.

The entire action of Congress was for the benefit of the Indian and not to his disadvantage. To grant to these Indians, individually and absolutely, this vast amount of land, to-wit: six hundred and forty acres each, at a time when it must be presumed that they were utterly unfit to handle or dispose of it, would be, it seems to us, an unheard of thing to do on the part of a guardian towards its ward, and that ward one to whom the government is bound by every principle of justice and humanity to protect to the fullest extent; a ward who is more helpless than those known among the civilized, because mere age seems to add but little, if any, strength of character or ability to profitably or safely handle his own; a ward whose incapacity is so great and so universally recognized that Congress has seen fit to heavily penalize one who even gives him an intoxicating drink, and had, at the time this agreement was ratified, declared him incapable of entering into a contract for services relative to his land without the approval of the Secretary of the Interior and Commissioner of Indian Affairs. Section

03, *Revised Statutes.* With these acknowledged facts fore us, is it possible to successfully contend that Con- ess ever intended to place in the hands of these irre- onsible beings, who are more helpless than a minor of e white race, riches which they are incapable of hand- ıg and which at once tempts the cupidity of those ıom it has been the policy of the government to pro- ct against?

The efforts of the government are not made for the ırpose of depriving the Indian of anything which is, should be, his, but for the sole purpose of protecting m from himself and others, and whatever may be the ɔinion of the individual as to the Indians, they were rtainly here first, and the government can do no more less than to continue to act along the lines of its esent policy, and give such other protection as is ithin its power. It was so acting when it conditionally tified the agreement herein discussed, and was so act- g when this suit was instituted.

We contend that the action of the lower court in ıstaining the demurrer to the complaint, and entering judgment of dismissal was error, and should be re- ersed.

Respectfully submitted,

A. G. AVERY,
United States Attorney.

J. B. LINDSLEY,
Assistant United States Attorney.